

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1587

To be argued by
ROBERT M. CALLAGY

United States Court of Appeals

FOR THE SECOND CIRCUIT

MICHAEL MEEROPOL and ROBERT MEEROPOL,

Plaintiffs-Appellants,

—against—

LOUIS NIZER and DOUBLEDAY & COMPANY, INC.,

Defendants-Appellees,

—and—

FAWCETT PUBLICATIONS, INC.,

Defendant-Intervenor-Appellee.

BRIEF FOR DEFENDANTS-APPELLEES

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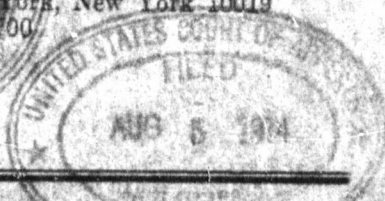
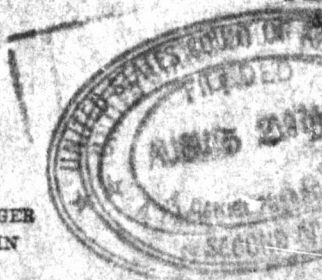
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—and—

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BRIEF FOR DEFENDANTS-APPELLEES

Counter-Statement of Issues Presented for Review

1. Did the Court below have jurisdiction to stay the Connecticut action?
2. Having such jurisdiction, did the Court below properly exercise its judicial discretion in staying the Connecticut action?

Counter-Statement of the Case

A. *Opinion and Order Appealed:*

Plaintiffs-Appellants Michael and Robert Meeropol ("appellants") appeal from an unreported opinion (A. 130-134)* and Order (A. 7-9) of the United States District Court for Southern District of New York (Hon. Harold R. Tyler, Jr.), dated April 3, 1974. This opinion and order enjoined an action instituted by the appellants against Defendant-Intervenor-Appellee Fawcett Publications, Inc. ("Fawcett") in the United States District Court for the District of Connecticut (the "Connecticut Action") and permanently stayed and enjoined the appellants and their attorneys from taking any further action or proceeding in the Connecticut action until entry of a final judgment in this action pending in the Southern District of New York.

B. *Facts:*

This action (the "New York action") was instituted by Appellants on June 19, 1973, the twentieth anniversary of the execution of Ethel and Julius Rosenberg. Appellants are the natural children of Ethel and Julius Rosenberg who were executed for conspiracy to commit espionage.

Defendant Louis Nizer ("Nizer") is the author of a book entitled *THE IMPLOSION CONSPIRACY* ("the book"). Defendant Doubleday & Company, Inc. ("Doubleday") published the hard bound edition of the book and Fawcett, as Doubleday's licensee, published the paperback. (Defendants are hereinafter collectively referred to as "appellees").

As summarized by the court below, the complaint (A. 10) asserts three counts: (1) for statutory copyright infringe-

* A. refers to pages of the Appendix.

ment pursuant to 17 U.S.C. §101 with a prayer for permanent injunctive relief; (2) for malicious defamation and invasion of appellants' privacy through publication of the book;* and (3) for common law infringement of and for injury to appellants' property rights in unpublished and uncopyrighted works of their parents (361 F. Supp. at 1065).

It is appellees contention, which they have expressed on numerous occasions to the court below (*see e.g.* A. 54, 58, 59), and which has been borne out by various opinions of the court, that this action completely lacks merit. Based on the manner in which appellants have been prosecuting the case, appellees have concluded that appellants' primary reason for instituting and prosecuting the action is to provide a platform for their public campaign to exonerate their parents. The record in this case is replete with instances in which appellants and their attorneys have sought to obtain publicity for their cause without regard to the merits of the action or the rights of the appellees.**

Simultaneous with the filing of the New York complaint, appellants moved for a preliminary injunction which, in general, sought to enjoin Nizer and Doubleday from further sale or disposition of copies of the book, either in original hard cover or *paperback form*. Appellees Nizer and Doubleday cross-moved for summary judgment dismissing

* By order and opinion dated July 31, 1974, Judge Tyler granted appellees motion for summary judgment dismissing the second count of the complaint which sought damages for defamation and invasion of privacy.

** As Judge Tyler recently observed in the opinion and order dated July 31, 1974: "Indeed, the procedural history of this case is replete with attempts by plaintiffs' counsel to obfuscate the issues and to delay the progress of the case." (p. 23, fn. 4).

the copyright infringement count (complaint, Count I). On July 18, 1973, Judge Tyler issued an Opinion and Order which denied in all respects appellants' motion for a preliminary injunction against the book including any forthcoming paperback edition and also denied the cross-motion by Nizer and Doubleday for summary judgment, with leave to said appellees to renew such motion after appellants had completed discovery. This decision is reported at 361 F. Supp. 1063.

On July 24 and July 25, 1973, Nizer and Doubleday, respectively, filed their answers to appellants' complaint (A. 35 and 42 respectively). These answers admitted the authorship and publication of the book, but placed in issue all other material allegations contained in the complaint and pleaded various affirmative defenses.

Thereafter, extensive discovery proceedings were engaged in by the parties. Briefly summarized, various sets of notices to produce and written interrogatories were exchanged and depositions of Nizer and Doubleday and another witness were commenced. (A. 51-54). The extent to which the New York District Court has already become involved in this action is best expressed by the fact that to date it has rendered at least six written opinions and seven orders concerning both procedural and substantive aspects of the case. As recently as July 31, 1974, Judge Tyler granted a motion for summary judgment by Nizer and Doubleday dismissing the second count of the complaint (claims based on defamation and invasion of privacy).

On March 6, 1974, eight months after the institution of the New York action and despite the fact that Fawcett was amenable to suit in New York, appellants instituted a new action in Connecticut naming Fawcett the sole de-

fendant by reason of its publication, as Doubleday's licensee, of the paperback edition of the book. The launching of this new lawsuit was again the springboard for another wave of publicity. The original Connecticut complaint (A. 60) contained a single cause of action which incorporated the first and third counts of the New York complaint. Thereafter, appellants amended their Connecticut complaint (A. 76) to include a second cause of action for malicious libel and invasion of privacy which is substantially identical to the second count of the New York complaint which has now been dismissed.

A comparison of the two complaints reveals that the issues raised in these two actions are identical and the defendants are, for all practical purposes, the same since Doubleday has agreed to indemnify Fawcett from all claims resulting from its publication of the paperback (A. 57). Even the relief sought in both actions is the same.

Accordingly, on March 19, 1974, Fawcett and Doubleday moved by order to show cause before Judge Tyler in New York to stay the appellants from prosecuting the Connecticut action (A. 49-50). On that date the Court below temporarily stayed the Connecticut action pending oral argument on March 22, 1974 (A. 49-50). Thereafter, appellants cross-moved to vacate the order to show cause (A. 8, 9).

At the oral argument on March 22, 1974, Judge Tyler ruled that he would stay the Connecticut action pending final disposition of the New York action on the condition that Fawcett intervene in the New York action. On March 28, 1974, Fawcett moved for leave to intervene (A. 119).

On April 3, 1974, Judge Tyler in an Opinion (A. 130) and Order (A. 7) took the following action:

1. Permanently stayed the appellants from prosecuting the Connecticut action pending final judgment in the New York action;
2. Denied appellants' motion to vacate the order to show cause;
3. Granted Fawcett's motion for leave to intervene;
4. Denied appellants' motion to adjourn the settlement of the order or to stay the order pending appeal.

On April 20, 1974, appellants served a notice of appeal (A. 4) from all matters contained in Judge Tyler's Opinion and Order dated April 3, 1974. Appellees promptly moved before this Court to dismiss the appeal as to those items which were clearly not appealable. Although appellants opposed this motion and this Court granted an accelerated briefing and argument schedule rather than determine the motion to dismiss the appeal, in their brief on appeal, appellants make no mention of the above items 2, 3 and 4 in Judge Tyler's Opinion and Order and have briefed only the propriety of the stay of the Connecticut action. Accordingly the other specified grounds for this appeal which were the basis of appellees' motion to dismiss the appeal have been abandoned by appellants and they will be so treated by appellees.

Throughout the statement of facts in appellants' brief, two glaring mis-statements continually appear: (1) that there are substantial differences in the indemnification provisions in the publishing agreements between Nizer and Doubleday and Doubleday and Fawcett, respectively and (2) that the issues raised in the two complaints are not identical because Fawcett had notice, prior to publication, of appellants' claims.

With respect to the indemnification provisions, a cursory comparison of the Nizer-Doubleday provisions (set forth in the appendix to appellants' brief) with the Doubleday-Fawcett provisions (A. 56) reveal that both encompass all issues raised by appellants in either complaint. Appellants' lengthy protestations to the effect that the Doubleday-Fawcett indemnification is not as all-encompassing as the Nizer-Doubleday indemnification is without merit. Furthermore it is irrelevant. Suffice it to say that Doubleday has agreed to indemnify and undertaken to defend Fawcett from and against all claims asserted by appellants.

With regard to the fact that Fawcett had prior notice of appellants' claims, Fawcett, just as Nizer and Doubleday, was and continues to be of the opinion that appellants' claims lack merit. Appellants' contention that Fawcett's prior notice has the effect of changing the identity of issues in the two actions completely ignores the dispositive nature of the defenses pleaded by all appellees. For example, the copyright infringement claim is in no way dependent upon notice of the claim. Furthermore such notice could not effect the libel and invasion of privacy claims especially now that they have been dismissed "[T]he statements were neither false nor defamatory" and, as a matter of law, "do not sustain a claim for invasion of privacy." * Opinion of Tyler, Jr., July 31, 1974, pp. 14, 16.

Moreover, the fact that Fawcett was aware of appellants' claims and yet published the paperback edition cannot create a meritorious claim where none existed before. Fawcett, through its attorneys and through Doubleday's attorneys (who also represent Fawcett in the defense of

* In regard to the libel and invasion of privacy claims, Judge Tyler stated in the Opinion dated July 31, 1974: "In this Court's view, such arguments are tortured, contrived and meritless." (p. 12) This precisely summarizes Fawcett's opinion prior to publication.

this action) was intimately familiar with the factual basis of appellants' claims and the refusal by the New York Court to enjoin the forthcoming paperback edition and reached a conclusion prior to publication of the paperback that appellants' claims were without merit. Even without such investigation, a review of Judge Tyler's opinion denying appellants' request for preliminary injunctive relief is strongly indicative of the lack of merit of these claims. For example, among other things, Judge Tyler stated the following concerning appellants' copyright infringement claim:

"It does not follow from this fact, however that the Court can grant relief on the *comparatively meager showing as advocated by plaintiffs.*" (Emphasis added.) 361 F. Supp. at 1067.

* * *

"Consideration of the original volume entitled DEATH HOUSE LETTERS and more importantly the contents of THE IMPLOSION CONSPIRACY suggests that this test [the fair use test] is more than adequately met." (Emphasis added.) 361 F. Supp. at 1068.

* * *

"As I read THE IMPLOSION CONSPIRACY, the quotations were used with discretion and with demonstrable purpose to illustrate from an historical and legal point of view that post-conviction appeals and petitions for clemency which were filed by and for Mr. & Mrs. Rosenberg. The relevant portions of the book almost certainly will provide reasonable valuable source material for future historians, biographers and social scientists. Indeed, the conceded fact that the letters have been out of publication here and abroad for almost twenty years, in my view, tends to enhance the use of the letters in question. *Thus, defendants are likely to prove that their book is a serious, full and readable account of what was a trial of great historical interest;*

that resort to quotations of certain of the Rosenbergs' letters is important to any serious book on their trial; and that there is little possibility of injury to the plaintiffs. Indeed, defendants may be able to show that their book has enhanced the value of plaintiff's copyright." (Emphasis added.) 361 F. Supp. at 1068.

* * *

"Earlier in this memorandum it was indicated that *plaintiffs are unlikely to prove their first stated claim of statutory copyright infringement by reason of the appropriate defense of fair use.*" (Emphasis added.) 361 F. Supp. at 1070.

In summary, therefore, the fact that Fawcett may have had prior notice of appellants' claims does not legitimize them, and its own investigation of the facts, including a reading of the opinion of the District Court denying injunctive relief, clearly revealed that these claims were baseless and without merit. At the very least, this was a reasonable conclusion and, therefore, such notice to Fawcett does not significantly change any of the defenses available to all the appellees.

Throughout their brief, appellants raise vague innuendos concerning the reasons that Fawcett and Doubleday chose to move in the New York Court to obtain the stay of the Connecticut action. They seem perturbed that appellees did not go to Connecticut to obtain a stay or seek a transfer; (this is obviously because appellants wanted a second chance to relitigate the issue of the preliminary injunction of the paperback edition (see *infra*)).

However, to set the record straight, at the time Fawcett was served in Connecticut, because of its indemnification agreement with Doubleday, Fawcett immediately advised Doubleday about the action and, pursuant to said indemnifi-

cation, Doubleday undertook to defend Fawcett. Thereafter, all the appellees conferred to discuss the options open to them with respect to the defense of the Connecticut action. Because of the extensive litigation and discovery which had already occurred in New York; because all the defendants and an overwhelming majority of witnesses were to be found in New York; and because Connecticut had no nexus to this action save the fact that it happens to be the location of Fawcett's corporate headquarters, it was concluded that the interests of justice and the economics of time and money mandated that the action should proceed in New York against all the parties (A. 51). Thus, the only decision to be made was what procedural avenue would best accomplish this at the least cost to appellees.

Quite simply, appellees chose to move for a stay in New York because to do so was the most expeditious avenue available. To go to Connecticut, either for a stay or to transfer, would have required setting forth before a second district court the entire record of a case with which the New York Court was intimately familiar. Because of local Connecticut rules, it would also have necessitated retaining and familiarizing local Connecticut counsel with the case. In short, time and money dictated that the District Court Judge who was already familiar with all aspects of this case should be the one to decide if proper judicial discretion warranted a stay of the recently instituted Connecticut action.

Aside from the compelling reasons set forth above, the Court should also know that Judge Newman, the Connecticut District Court Judge assigned to the Connecticut action, had decided that he was going to transfer the Connecticut action to New York anyway. Judge Tyler advised appel-

lants' attorneys about Judge Newman's plans to transfer at a hearing on April 5, 1974, when Judge Tyler stated:

The Court "... I made an oral ruling. I have now written the memorandum. I have conferred with Judge Newman. Judge Newman agrees that even if I didn't do all the splendid things that I have done here [stay the Connecticut Action, permit Fawcett to intervene, etc.], he was about to transfer the case to this district in any event, and I quite agree with him, he should."

"So I don't know what all this marvelous skirmishing is all about" (A. 140-141).

Thus, no matter which avenue appellees had taken, the present situation of having all the parties before the New York Court would have resulted.

Summary of Argument

The court below properly held that it had jurisdiction to stay the Connecticut action because the issues in the two actions were identical and because Doubleday had agreed to indemnify Fawcett from all claims against Fawcett in the Connecticut complaint. It held that "resultant savings of time and money to the federal courts, the litigants and their counsel" mandated an exercise of judicial discretion staying the Connecticut action.

In this brief, appellees demonstrate that upon the record in this action and as a matter of law, the court below had jurisdiction to issue a stay and the issuance of such stay was a proper exercise of judicial discretion which should be affirmed.

ARGUMENT

POINT I

The order staying the appellants from prosecuting the Connecticut action should be affirmed.

A. *The District Court had jurisdiction to stay the Connecticut action.*

This Court has consistently held that where an action is brought in one federal district court and a later action embracing essentially the same issues is brought in another federal court, the first court has jurisdiction to enjoin the prosecution of the second action. *See, e.g., Coakley & Booth, Inc. v. Baltimore Contractors, Inc.*, 367 F.2d 151 (2d Cir. 1966); *National Equipment Rental Ltd. v. Fowler*, 287 F.2d 43 (2d Cir. 1961).

This rule has been applied by this and other courts even where the parties in the two actions are not identical. In *Telephonics Corporation v. Lindley & Co.*, 291 F.2d 445 (2d Cir. 1961) in Action #1, A sued B in New York for a declaratory judgment that B's patent was invalid. In Action #2, B sued C, a *customer* of A in North Carolina alleging infringement of that same patent. There was an indemnity agreement running from A to C. This Court affirmed the New York District Court's order enjoining B from continuing the action in North Carolina:

"The action subsequently begun against plaintiffs' customer in North Carolina was simply an attempt to litigate in another forum a dispute that is basically between the plaintiffs and the defendant. Since the order below permitted Glen Raven [the customer] to

intervene as a party plaintiff in the present action, defendant may have any affirmative relief that is justified against Glen Raven by way of counterclaim here. *The fact that the North Carolina action was brought against a defendant not originally a party to the New York action is thus no bar to the grant of the injunction appealed from.*" (Emphasis supplied.) 291 F.2d at 447.

Similarly, *Maclaren v. B.I.W. Group, Inc.*, 329 F. Supp. 545 (S.D.N.Y. 1971), a case exactly on point, involved an action for patent infringement instituted in the Southern District of New York to preliminarily enjoin the defendant manufacturing firm from further sales of baby strollers which allegedly infringed plaintiff's patent. After instituting the action against the defendant manufacturer, plaintiffs instituted a second action in the Western District of New York against defendant's customers. (These customers are analogous to Fawcett in the instant case, since Fawcett is simply the paperback licensee of Doubleday.) The defendant manufacturer thereupon moved in the Southern District to enjoin the action in the Western District of New York. Judge Gurfein held that because the action in the Southern District was the first to be commenced and had proceeded into the discovery stage, because, defendant's lawyers in the Southern District were "of counsel" in the Western District, and because the defendant manufacturer had undertaken to defend and to indemnify the defendants in the Western District action (all of the above factors are present in this case), plaintiffs should be enjoined from further prosecution of the Western District action.

Judge Gurfein did condition this stay, requiring defendants in the Western District to intervene as a party de-

fendant in the Southern District action. In this action, Fawcett has intervened as a defendant in the New York action and the other defendants have agreed to accept service of a supplemental complaint so naming Fawcett.

Likewise, in *Urbain v. Knapp Brothers Manufacturing Co.*, 217 F.2d 810 (6th Cir. 1954), *cert. den.*, 349 U.S. 930 (1955), the Sixth Circuit affirmed a stay by the District Court in which a patent action was first instituted enjoining further proceedings in a subsequently instituted action in a second district court. In *Urbain*, the defendant in the first action had also agreed to indemnify the defendants in the second action. The Sixth Circuit said:

. . . [T]hat it falls within the sound discretion of the District Court to stay proceedings in another district, where the separate defendants are in privity and the plaintiffs and the issues are identical, even though all the parties in each of the two actions are not the same. If the plaintiffs in the cases are identical and the defendants in one case are in privity with those in the other, even though not formal parties, the District Court which first obtains jurisdiction has the right, in our judgment, to enjoin proceedings brought later in another district, especially when numerous steps have been taken in the court whose jurisdiction was first invoked. *Id.* at 815.

Although appellants in their brief spend pages engaging in illusory exercises arguing to the contrary, the District Court made a proper factual finding to the effect that the issues in both actions were substantially identical and that Doubleday and Fawcett are in privity.*

* Appellants' contention throughout their brief that the original order to show cause was defective because it was brought only in the name of Fawcett hardly merits comment. The same law

In fact, although not required as a condition for granting a stay, it is clear that the disposition of the New York action as already has partially occurred by reason of the dismissal of the libel and invasion of privacy claims, will, as a matter of law, have *res judicata* and/or *collateral estoppel* affect upon the Connecticut action.

The Court below made a factual finding that ["I]t is undisputed that by contractual arrangements between Doubleday and Fawcett, the former has agreed to indemnify Fawcett for claims resulting from its publication of the paperback version of the Nizer book" (A. 131-132). This finding by the District Court was sufficient grounds under the cited precedents for it to stay the later instituted action since the rights and obligations of Doubleday and Fawcett were similar. The respective indemnification provisions, discussed above, establish this and speak for themselves. Most certainly Doubleday has undertaken to defend Fawcett for all claims asserted by appellants for Doubleday is the real party-in-interest in the Connecticut action. There is no conflict of interest between Doubleday and Fawcett as appellants contend and this is obvious since both are represented by the same attorneys. Indeed, all appellees have recognized their responsibilities under their respective agreements and appellants protests to the contrary are a mere pretext with no factual basis.

firm represents both Fawcett and Doubleday in this action and for practical purposes, Fawcett and Doubleday are one. Although appellees did not agree with appellants' contention, Doubleday joined the order to show cause originally filed on behalf of Fawcett. This was done by letter from Fawcett and Doubleday's attorneys dated March 20, 1974 (A 88) and the Court below properly held that any "technical defect" was cured by this letter. In any event, what is certain is that appellants have not shown nor have they been prejudiced in any manner by the procedure followed.

In short, the incontestable findings of fact by the Court below and the above-cited precedents make clear that the District Court had jurisdiction to stay the Connecticut proceedings. In fact, all the cases cited by appellants in their brief unequivocally support this proposition (*See, e.g., Coakley & Booth, Inc. v. Baltimore Contractors, Inc., supra.*); *Cresta Blanca Wine Co., Inc. v. Eastern Wine Corporation*, 143 F.2d 1012 (2d Cir. 1944); *Thermal Dynamics Corp. v. Union Carbide Corp.*, 214 F. Supp. 773 (S.D.N.Y. 1963); *Simon & Schuster, Inc. v. Cove Vitamin & Pharmaceutical, Inc.*, 211 F. Supp. 72 (S.D.N.Y. 1962); *International Nickel Co. v. Ford Motor Co.*, 108 F. Supp. 833 (S.D.N.Y. 1952).

The Court below had jurisdiction to stay the Connecticut action.

B. *Absent a clear showing of abuse, the District Court's exercise of discretion in staying the Connecticut action must be affirmed.*

It being unequivocally established that the Southern District had jurisdiction to stay the Connecticut action it remains only to be determined whether the exercise of discretion in issuing the stay was not clearly erroneous. No citation of authority is necessary to support the well-established principle that an Appellate Court will not reverse a trial court in a discretionary matter unless the exercise by the lower court is found to be clearly abusive. Any such finding in this case would be contrary to all standards of logic and reason.

As is set forth above, the New York action had been actively litigated for eight months prior to the institution of the Connecticut action. That appellants chose to volun-

tarily institute their first action in New York is not disputed. To say that Judge Tyler was and is very familiar with this action would be a colossal understatement. The New York Court has already issued at least six written opinions and seven separate orders. To document the number of court appearances or the number of informal letters, usually all at appellants' instigation, written to Judge Tyler concerning various aspects of the litigation, would be all but impossible. The New York District Court was intimately familiar with the extensive pretrial proceedings and discovery which had occurred prior to the institution of the Connecticut action and, of course, much more has occurred since that date. The Court below also knew that the nexus of this action was with New York, both with respect to the parties and with respect to potential witnesses and documents. Connecticut's only connection is that it happens to be the location of Fawcett's principal place of business, although it is not disputed that Fawcett was and is also located in New York and that New York is where its editorial work is performed. Furthermore it is obvious from Judge Tyler's recollection of his conversation with Judge Newman that the Connecticut Court equally recognized that New York was the proper forum for the litigation. (A. 140-141).

In short, had the Connecticut action been permitted to proceed, both the courts and the parties would have expended unnecessary time and effort and needless expense. Recognizing all these facts, the Court below determined that proper judicial discretion warranted staying the Connecticut action.

Appellants contend (at p. 30 of their brief) that this exercise of discretion was abusive because it prejudices them in two ways: (1) it denies them a hearing in Connect-

icent, on their motion for a preliminary injunction of the paperback and (2) it denies them a right to a jury trial (which they admittedly waived as to Nizer and Doubleday*), against Fawcett. Neither of these contentions have an iota of merit.

By seeking a preliminary injunction against the paperback edition of the book in Connecticut, appellants were flagrantly attempting to seek the same relief which was denied them in New York. In denying the injunctive relief sought below, the District Court stated:

"In their moving papers, plaintiffs demand sweeping injunctive relief. Specifically, they seek an order enjoining the defendants from infringing the copyright of plaintiffs in any manner and from selling or disposing of any copies of *The Implosion Conspiracy*; directing that defendants deliver up for impounding all copies of the book under their control, all plates, molds and other printing materials, and all advertising and promotional materials which include any references to the letters of Ethel and Julius Rosenberg. At oral argument, however, plaintiffs' counsel took what he styled to be a more realistic approach and requested delivery only of the 15,000 inventory hard cover copies from the warehouse of Doubleday, *and the enjoining of any possible paperback publication*, or sale of any movie or television rights to the book by the defendants." (Emphasis added.) 361 F. Supp at 1066-67.

Judge Tyler then concluded:

"To summarize, then, the plaintiffs' motion for temporary injunctive relief is *denied in all respects*. . . ." (Emphasis added.) 361 F. Supp. at 1070.

* The New York District Court confirmed this fact in its opinion dated June 27, 1974.

Thus, "the enjoining of any possible paperback publications" of the book was specifically considered and rejected by the New York District Court. This Court should also know that appellants filed a notice of appeal from the order denying the injunction, but thereafter formerly withdrew same. Thus appellants cannot be prejudiced by a stay which quite correctly denied their attempt to relitigate this same issue. Indeed, this Court has specifically held that such an obvious ploy to avert a decision of a brother court is grounds for issuing a stay. (*See Coakley & Booth, Inc. v. Baltimore Contractors, Inc., supra.*)

Moreover, even if this were not so, the appellants have not been prejudiced by the denial of the preliminary injunction and, indeed, the District Court was of the opinion that their position with respect to their alleged copyright had in fact been enhanced by appellants' publication:

"Moreover, there is absolutely no suggestion, let alone proof, that the publication of *The Implosion Conspiracy* has lessened the value of the letters of Julius and Ethel Rosenberg. Practically speaking, the only realistic inferences are to the contrary—i.e. that the defendants' book probably has been the only significant event that might enhance their value." 361 F. Supp. at 1069-70.

With respect to the alleged prejudice concerning their right to a jury trial, it is the actions and inactions of appellants' attorneys,* and not the stay of the Connecticut Court, which have resulted in appellants' waiver of a jury trial.

* Appellants' attorneys admit that through "mistake and inadvertence" they neglected to properly demand a jury trial as to defendants Nizer and Doubleday (appellants' brief, page 8).

Furthermore, appellants' attempt to revive, apparently on the basis of Fawcett's intervention in the New York action, their right to a jury trial against Nizer and Doubleday has been specifically rejected by Judge Tyler in his opinion dated June 27, 1974. With respect to appellants demand for jury trial against Fawcett in New York, Judge Tyler held that the demand was *premature* because appellants have refused to file a supplementary complaint in New York which seeks relief against Fawcett. Consequently, Judge Tyler cannot now determine if appellants' alleged grievance against Fawcett is appropriate for jury determination. Thus, how can appellants claim the Connecticut stay prejudices them in their purported "right" to a jury trial against Fawcett?

In short, the stay did not prejudice appellants in any legitimate manner.* Denying appellants another forum to reargue a second time a matter determined against them by a federal court, or denying appellants another platform from which to pursue their efforts to exonerate their parents are not legitimate prejudices. Indeed, had appellants been litigating their claims in good faith without ulterior motives, they would have welcomed the stay of the Connecticut court action and Fawcett's New York intervention because they now have before one Court all parties against whom they have claims. They too, like appellees and the Court, should recognize the resultant savings in time and expense.

Also, as mentioned previously, all the cases cited by appellants in their brief clearly support appellees' position that the issuance of a stay is a matter within the discretion

* This is especially true when considered in light of Judge Newman's statement to Judge Tyler that he would have transferred the Connecticut action to New York. (A 140-141). Surely Judge Newman, before transfer, would not have stayed the paperback in direct contradiction of Judge Tyler's order.

of the District Court. Appellants seek succor in these cases merely because in some a stay was not issued. However, a stay being a matter of discretion, the fact that a stay may not have been issued under a certain set of inapposite facts in no way supports a contention that the stay in this action should not have been issued.

That these cases are inapposite is readily apparent from a cursory reading of them. For example, in *Thermal Dynamics Corp. v. Union Carbide Corp.*, *supra*, the causes of action in the two actions were clearly different—the first being for patent infringement while the second was for antitrust violations—and it was not even established that the two actions arose under similar facts. *Simon and Schuster, Inc. v. Cove Vitamin and Pharmaceutical, Inc.*, *supra*, involved a state action for breach of contract and a federal action for copyright infringement in which the plaintiff and defendants in the state action were reversed in the federal case. The defendants were attempting to enjoin the federal action so that they could pursue their breach of contract claim in state court, a forum where the plaintiff (the defendant in the state court) could not pursue its copyright infringement claim. Under these circumstances, Judge Tyler, in his discretion, refused to stay the federal action because it would have prejudiced plaintiff in the pursuit of its copyright infringement claim. No facts remotely analogous to these are posed in the instant action.

Conversely, under completely different circumstances, where the two actions are virtually identical, where all the parties in the two actions, for practical purposes, are identical and where all issues could be decided in one action, Judge Tyler, again exercising his discretion, issued a stay.

With Fawcett's intervention, all the interested parties are now before the District Court in New York and there simply is no conceivable justification for continuing the prosecution of the Connecticut action. As Judge Tyler observed:

"In summary, it appears that plaintiffs' claims against all defendants, including Fawcett, can be heard in this Court, with resultant savings of time and money to the federal courts, the litigants and their counsel.

* * *

[S]ince all parties are now before this court [there is] no prejudice to plaintiffs, [and] any appeal from these rulings would seem to be dilatory and frivolous" (A. 133-134).

In conclusion, the New York District Court was intimately knowledgeable of the facts and circumstances of this action by virtue of appellants having voluntarily instituted and litigated that action for eight months prior to the institution of the Connecticut action. The Court below was aware of the extensive proceedings outlined above, which had already occurred in New York and that New York has the closest nexus to this action. It knew that appellants were attempting to circumvent its prior order denying them preliminary injunctive relief against a paperback edition of the book, and that the issues and parties in both actions were identical. The District Court recognizes that appellants would have to prove the identical facts in the Connecticut action as they will in New York in order to recover and that each defense applicable to Nizer and Doubleday is equally applicable to Fawcett and that therefore all appellants' claims could be heard in one court.

In order to prevent a great waste of judicial time, as well as unnecessary time and expense to all the parties, by permitting the conduct of identical proceedings in two fora, the District Court properly exercised its discretion and stayed the Connecticut action. The facts mandated that this stay be issued. No case is cited by appellants and none could be found in which a federal appellate court would reverse such an exercise of proper judicial discretion.

CONCLUSION

For the reasons stated above, it is respectfully requested that the order appealed from be affirmed in all respects.

Respectfully submitted,

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STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

JOSEPH BOSELLI , being duly sworn, deposes

and says, that on the 5 TH day of AUGUST 1974 , at 3:30 o'clock

P. M. he served the annexed BRIEF FOR DEFENDANTS-APPELLEES in Re:
MICHAEL MEEROPOL AND ROBERT MEEROPOL, v. LOUIS NIZER AND DOUBLEDAY & CO., INC.

upon SAMUEL GRUBER, ESQ,

Esq(X)., Attorney(X)

for PLAINTIFF-APPELLANTS

by depositing 3 true copies

thereof in a Post Office Box regularly maintained by the Government
of the United States and under the care of the Postmaster of the
City of New York at Village Station, New York, N. Y. 10014, enclosed
in a securely closed wrapper with the postage thereon prepaid, ad-
dressed to said attorney(X) at (his/XXX) office
218 BEDFORD STREET, STAMFORD, CONNECTICUT 06901

that being the address designated in the last papers served herein by
the said attorney.

Sworn to before me this

day of

August

1974

Joseph Boselli
5th
Michael H. Sohn
MICHAEL H. SOHN
Notary Public, State of New York
No. 41-9100710
Qualified in Queens County
Commission Expires March 30, 1975

Service of three (3) copies of the within *BRIEF*
is admitted this *5th* day of *August* 19*74* *4:15 P.M.*

W. H. Bell

PLAINTIFFS-APPEARANCES

CO., INC.